UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ASSOCIATED PRESS,	:	**ECF CASE**
	:	
Plaintiff,	:	
	:	
- v.-	:	
	:	05 Civ. 3941 (JSR)
	:	
UNITED STATES DEPARTMENT OF DEFENSE,	:	
	:	
Defendant.	:	

- -x

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Associated Press v. United States Department of Defense Doc. 14

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff, - v.- UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	:	**ECF CASE** 05 Civ. 3941 (JSR)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

In July, 2004, the United States Department of Defense ("DOD") established the Combatant Status Review Tribunal process as the mechanism by which detainees at the U.S. Naval Base, Guantanamo Bay, Cuba ("Guantanamo"), could contest their classification as enemy combatants. Plaintiff Associated Press ("plaintiff" or "AP") made a Freedom of Information Act ("FOIA") request to DOD for transcripts of those proceedings, and for documents submitted to the Tribunals by detainees. DOD has now produced nearly 4,000 pages of responsive documents. DOD has not withheld any documents from production, but has redacted from the documents provided to AP identifying information about the detainees and witnesses before the Tribunals, pursuant to Exemption 6 of FOIA. Those redactions are proper and should be upheld.

Exemption 6 of FOIA exempts from disclosure documents and information about individuals the disclosure of which would amount to a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To determine whether withholding is proper under this exemption, courts must balance the individual's privacy interest in the withheld information against the public interest in its disclosure. The only public interest cognizable in this balancing test is the public interest FOIA was meant to serve, namely, the public's interest in knowing how the government is conducting its business.

The information redacted from the produced documents consists of names, home locales, nationalities, and other personal information about the Guantanamo detainees and their witnesses before the Combatant Status Review Tribunals ("CSRTs"). Based on the large amount of information available about the detainees, DOD reasonably believes that disclosure of the redacted information (beyond just detainee names) could identify particular detainees and connect them to the detailed personal stories they provided to the Tribunals. DOD is also concerned that connection of particular detainees to the evidence they provided to the CSRTs could subject the detainee's family abroad (and the detainee himself) to reprisals if enemy combatants, terrorist groups, or other detainees are dissatisfied with the detainee's statements. The case law is unequivocal that disclosure in these circumstances would implicate privacy interests protected by Exemption 6.

On the other hand, there is little public interest in disclosure of detainee identifying information – beyond the curiosity value in knowing as much as possible about particular detainees – because such disclosure would shed no light on DOD's conduct of the CSRTs; it would merely reveal more personal information about particular detainees. While revelation of such personal information may make a news story more interesting, that is not a public interest that FOIA protects. Consequently, disclosure of the redacted information would constitute a clearly unwarranted invasion of privacy, and DOD's redactions should be upheld.

STATEMENT OF FACTS

A. The Combatant Status Review Tribunals

By order of the Deputy Secretary of Defense dated July 7, 2004, DOD established the CSRT "process to determine, in a fact-based proceeding, whether the individuals detained . . . at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation." Memorandum from the Secretary of the Navy, dated July 29, 2004, regarding Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba ("July 29, 2004 Implementing Memorandum"), attached as Exhibit I to the accompanying declaration of Karen L. Hecker, dated June 30, 2005 ("Hecker Decl."); see also Order of the Deputy Secretary of Defense, dated July 7, 2004, Establishing Combatant Status Review Tribunals ("July 7, 2004 CSRT Order"), Hecker Decl., Exh. J. Each Tribunal was composed of three neutral commissioned military officers, none of whom was "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." July 7, 2004 CSRT Order, at 1-2, Hecker Decl., Exh. J.

The CSRT process provided each detainee with a range of procedural protections. Among other things, each detainee received notice of the factual basis for his designation as an enemy combatant and an opportunity to review unclassified information relating to the basis for that designation; an opportunity to appear personally, testify, call witnesses and present documentary evidence on his own behalf; and an opportunity to question other witnesses appearing before the Tribunal. See July 29, 2004 Implementing Memorandum, at 1, Hecker Decl., Exh. I. A detainee could not be compelled to testify before the Tribunal. See July 7, 2004

Order, at 3, Hecker Decl., Exh. J.

Each detainee was assigned a "personal representative," a military officer whose function it was to "assist[] the detainee in connection with the [CSRT] review process." July 7, 2004 Order, at 1, Hecker Decl., Exh. J. The personal representative had the opportunity to review any "reasonably available" information possessed by DOD that could be relevant to the detainee's designation as an enemy combatant, and could share any such information with the detainee, except for classified information. Id. The government's evidence supporting the detainee's classification as an enemy combatant was presented by the Recorder for each Tribunal, a commissioned military officer who was also required to present any exculpatory evidence that might "suggest that the detainee should not be designated as an enemy combatant." July 29, 2004 Implementing Directive, at Enclosure (2), page 1, Hecker Decl., Exh. I.

Each Tribunal decision was subject to mandatory review first by the Legal Advisor to, and then by the Director of, the CSRTs. See id. at Enclosure (1), page 9, Hecker Decl., Exh. I.

B. Plaintiff's FOIA Request

By letter dated November 4, 2004, plaintiff, by its counsel, requested that DOD produce three categories of records:

- "[t]ranscripts of all testimony given to any Combatant Status Review Tribunal (CSRT) by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba since July 30, 2004";
- "[c]opies of all written statements provided to any CSRT by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba since July 30, 2004"; and
- "[c]opies of all documents that have been provided by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba to their assigned 'personal representatives,' including any document stating the basis for a detainee's refusal to attend a CSRT."

Letter dated November 4, 2004 from Halimah D. DeLaine to Rear Adm. James McGarrah and DOD Information Officer, attached to plaintiff's complaint (the "Complaint") as Exhibit C.[1] By letter dated November 8, 2004, DOD informed AP that it had granted expedited processing for AP's request. See Exhibit D to Complaint, Wolstein Decl., Exh. 1.

By letter dated November 18, 2004, AP submitted what it described as an amendment to its November 4, 2004 FOIA request. See Exhibit E to Complaint, Wolstein Decl., Exh. 1. The November 18, 2004 amendment requested production of any foreign language documents responsive to AP's November 4, 2004 request (together with the November 18 amendment, the "FOIA Request"). See id. When, as of February 10, 2005, DOD had not responded to the FOIA Request, AP submitted a letter appealing what it contended was the constructive denial of its request. See Exhibit F to Complaint, Wolstein Decl., Exh. 1. On April 19, 2005, AP filed the Complaint. See Docket Sheet as of June 28, 2005, at 1, Wolstein Decl., Exh. 2.

C. DOD's Search for Responsive Documents

DOD maintains a separate file for each CSRT. See Declaration of Teresa A. McPalmer, dated June 25, 2005 ("McPalmer Decl.") ¶ 3. Those files are maintained at the Arlington, Virginia headquarters of the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC"), a component of DOD responsible for conducting CSRTs and Administrative Review Boards ("ARBs") on the detainees held by DOD at Guantanamo. See id. All of the documents requested in the FOIA Request are contained in the CSRT files in OARDEC's Virginia offices. See id.

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[1] A copy of the Complaint, with exhibits thereto, is attached as Exhibit 1 to the accompanying Declaration of Elizabeth Wolstein, dated June 29, 2005 ("Wolstein Decl.").

To search for documents responsive to the FOIA Request, a member of the legal staff of the Legal Advisor to the CSRTs, Commander Teresa McPalmer, started reviewing OARDEC's files in January, 2005, before all the CSRTs were completed. See id. ¶ 4.[2] In April, 2005, after the CSRTs were completed, this staff member and a second legal staff member continued to search every file and retrieve responsive documents. See id. Both staff members worked under Commander McPalmer's direct control and supervision. See id. ¶ 5. As of that April, 2005 search, CSRTs for every detainee under DOD control at the U.S. Naval Base Guantanamo Bay, Cuba, had been completed. See id. ¶ 4. Accordingly, files for every CSRT ever conducted were reviewed. See id. When OARDEC found responsive documents, those documents were pulled from the file, copied, and set aside for further review to determine whether any portions of them were subject to any FOIA exemption. See id. ¶ 6.

Some detainees refused to participate in the CSRT hearing process. See id. ¶ 7. In such cases, there is no transcript of the detainee's testimony. See id. As a result, while DOD has produced all documents that are responsive to plaintiff's request for "[t]ranscripts of all testimony given to any Combatant Status Review Tribunal (CSRT) by any detainee at the U.S. Naval Base, Guantanamo Bay, Cuba since July 30, 2004," fewer transcripts were produced than the total number of detainees who had CSRTs at Guantanamo. See id. Similarly, not every detainee provided "written statements" to the CSRTs, or documents to his personal representative, the two other categories of documents requested in the FOIA Request. See id..

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[2] At the same time, the OARDEC legal staff was required to continue performing the essential legal mission of conducting legal sufficiency reviews for the CSRTs and ARBs, and providing day-to-day legal advice to OARDEC, as well as responding to FOIA requests in the queue ahead of plaintiff's and preparing factual returns to be submitted in detainee habeas litigation, all of which were very time-consuming. See McPalmer Decl. ¶ 4.

D. The Documents Produced

In response to the FOIA Request, DOD has produced more than 3,900 pages of responsive documents. See Hecker Decl. ¶ 3. No documents were withheld from production based on any FOIA exemption. See id. However, selected identifying information has been redacted from the documents that have been produced, as described further in subpart E, below.

1. Transcripts of Detainee Testimony Before CSRTs

The vast majority of the produced documents consists of transcripts of detainee testimony before the CSRTs, the material requested in the first category of the FOIA Request.[3] See Hecker Decl. ¶ 4. The transcripts reflect the detainee's statements to the Tribunal; questions from Tribunal members and the detainee's answers; questions by the detainee's Personal Representative and the detainee's answers; and the testimony of any other detainees who appeared as witnesses. See id. The transcripts also reflect DOD's presentation to the detainee of the factual bases for his classification as an enemy combatant. See id. The transcripts paint a detailed picture of the detainee's life before he was captured, revealing, among other information, his profession, work history, family ties, travel and experiences abroad, military training, and involvement with individuals or groups the United States considers terrorists or terrorist organizations, or groups connected to them. See id. Four sample transcripts are attached as Exhibit A to the Hecker Declaration.

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[3] The July 7, 2004 Order did not require the creation of a verbatim transcript of testimony before the CSRTs, but rather that the Recorder create a "summary of all witness testimony." July 7, 2004 Order, at 2, Hecker Decl., Exh. J ; see also July 29, 2004 Implementing Memorandum, at Enclosure (1) pages 8-9, Hecker Decl., Exh. I. The transcripts provided to plaintiff are the summaries of testimony generated pursuant to that directive. See McPalmer Decl. ¶ 8. These documents are accurate summaries of the testimony before the CSRTs. See id. No other transcripts of testimony before the CSRTs have been generated by DOD. See id.

2. Written Statements Provided by Detainees and Documents Provided by Detainees to Their Personal Representatives

A relatively small number of the produced documents consist of detainees' written statements submitted to the CSRTs (sometimes dictated to the detainee's personal representative), the second category of documents requested in the FOIA Request. See Hecker Decl. ¶ __. Two examples are attached as Exhibit B to the Hecker Declaration. A similarly small number of produced documents consists of documents provided by the detainee to his personal representative, the third category of documents requested in the FOIA Request. See id. These typically consist of correspondence from home and legal documents in the detainee's possession. See id. Three samples of such documents are attached as Exhibit C to the Hecker Declaration.

E. The Information Withheld

The redacted information falls into six general categories: (i) internment serial numbers, or "ISNs";[4] (ii) names and home locales of the detainees and their families; (iii) names of persons identified by detainees in the course of their testimony, or mentioned in detainee statements or documents (other than public figures, such as, for example, Hamid Karzai); (iv) identities of witnesses before the CSRTs; (v) nationalities of the detainees, and information sufficient to reveal their nationalities, such as, for example, the country a detainee departed at a certain point in time, where that information could reveal that the departed county was the detainee's home

[4] The ISN is an identifying number unique to the detainee, analogous to a social security number. See Hecker Decl. ¶ 7. A full ISN is a 12-digit alpha numeric identifier that incorporates certain abbreviated information about the detainee, such as the country of capture and his suspected nationality. See id. DOD also uses shortened ISNs consisting of three or four digits to identify detainees. See id. The shortened ISNs are still unique to the detainee. See id. It is the shortened ISNs that were redacted from the produced transcripts. See id.

country; and (vi) miscellaneous personal information which, together with other information, could be used to identify the detainee or witness, such as: tribal affiliation, language, place of capture, age, college attended, the ages of his children, or the names of his relatives, associates, or contacts abroad (collectively, the "Identifying Information"). See Hecker Decl. ¶ 6.[5] In one transcript, Bates-stamped AP 02856-2879, the detainee's mention of a physical problem of an intimate nature was redacted from page AP 02857, also under Exemption 6. See id.[6]

Five examples of transcripts in which information reflecting the detainee's nationality has been redacted (category (v) above) are attached as Exhibit D to the Hecker Declaration. Five examples of transcripts in which miscellaneous personal information has been redacted (category (vi) above) are attached as Exhibit E to the Hecker Declaration.[7]

DOD is concerned about the consequences to the detainees' families of disclosing identifying information that would link particular detainees to the detailed personal stories revealed in the transcripts. See Hecker Decl. ¶ 9. If the detainee's identity is connected to his testimony, and terrorist groups or individuals are displeased by something the detainee said to the Tribunal, DOD believes that this could put his family at serious risk of reprisals – including death or serious harm – at home. See id. This risk also translates to the detainee himself when he is released from detention. See id.[8] And these consequences also exist for the detainees who remain at Guantanamo. See id. Now that the CSRT transcripts and detainee submissions are in the public domain, it is possible that habeas counsel for the detainees could provide these documents to their clients at Guantanamo. See id. Approximately 210 Guantanamo detainees have habeas cases pending and that number increases each week. See id. The transcripts reveal that some of the detainees have provided incriminating information on other detainees. See id. Being identified to fellow detainees in this manner could create a grave risk to their safety. See id. Even if the detainee's name is redacted, other identifying information about him revealed in his transcript – such as his nationality, tribe, language, age, or the names of his contacts abroad – could be pieced together with other publicly available, or privately known, information about him to connect the particular detainee to his statements before the CSRT. See id. ¶ 10.

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[5] Some of the detainees have filed habeas cases in the District Court for the District of Columbia. In those cases, the government has publicly filed factual returns that include the CSRT transcript and other documents pertaining to that detainee. See Hecker Decl. at 3 n.1. Pursuant to a protective order in the habeas cases, the government redacts certain identifying information from the returns before filing them with the court, but not the name and nationality of the detainee who is the habeas petitioner. See id. That is because DOD considers the detainee to have voluntarily revealed his name and nationality by filing the habeas petition. See id. For those detainees who are also habeas petitioners, DOD provided AP with CSRT transcripts in the form in which they were publicly filed in the habeas cases. See id. Accordingly, some of the transcripts produced to plaintiff do reveal the detainee's name and nationality. See id.

[6] Names of miliary officials who served as Tribunal Presidents also have been redacted but those redactions are not challenged by plaintiff. See Hecker Decl. ¶ 6.

[7] The unredacted versions of both these categories of documents are being provided to the Court for in camera review together with DOD's moving papers, in accordance with the Court's directive at the June 13, 2005 conference.

There is a large amount of information on Guantanamo detainees readily accessible on the internet. See id. ¶ 11. The Washington Post, for example, has published a list of the purported names and nationalities of detainees held at Guatanamo (the "Washington Post List") which appears on its website. See id. A copy of the Washington Post List is attached as Exhibit F to the Hecker Declaration. Another private website, cageprisoners.com, describes itself as containing the "most comprehensive detainee list on the web," and also contains a purported list of detainees at Guantanamo and their nationalities. See Hecker Decl. ¶ 11 and Exh. G. The Washington Post List alone identifies other public sources of information on detainee identities, including an Arabic language website, a Pakistani newspaper report, a publication of the Yemeni government, and al Qaeda source in Afghanistan, as well as numerous general sources of information about detainees, including "media reports," "Arabic websites," and "legal documents." Hecker Decl., Exh. F, at 1. Cageprisoners.com contains photographs and profiles of purported detainees, as shown in the excerpt attached as Exhibit H to the Hecker Declaration.

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[8] To date, 234 detainees have left Guantanamo for their home countries, with approximately 105 leaving after the CSRT process had begun. CSRT transcripts exist for some of these detainees. These departures will be continuing into the future and transcripts also exist for many of those detainees. See Hecker Decl. ¶ 9.

Apart from public websites, DOD also believes that detainees' associates abroad are well aware that they are or were in United States custody, and could connect a particular detainee to his testimony the more personal details in that testimony are made public. See Hecker Decl. ¶ 12. Redaction of identifying information from the detainee's testimony and statements before the CSRTs is meant to minimize the ability of knowledgeable persons here and abroad to connect a particular detainee to the evidence he provided to the CSRTs, thereby protecting the detainee and his family members from potential reprisals. See id. At the same time, because the content of the transcripts and other evidence submitted to the CSRTs has been disclosed, the public has the ability to scrutinize DOD's performance of its duties in conducting the CSRTs. See id.

ARGUMENT

IDENTIFYING INFORMATION CONTAINED IN THE CSRT TRANSCRIPTS AND DOCUMENTARY EVIDENCE IS PROPERLY WITHHELD UNDER FOIA EXEMPTION 6

A. Standard of Review

FOIA was enacted to "ensure an informed citizenry, . . . needed to check against corruption and hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). The statute requires each federal agency to make available to the public an array of information, and sets forth procedures by which requesters may obtain such information. See 5 U.S.C. § 552(a). At the same time, FOIA exempts nine categories of information from disclosure, while providing that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." Center for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 925 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104 (2004).

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is the procedural vehicle by which most FOIA actions are resolved. See, e.g., Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."). "In order to prevail on a motion for summary judgment in a FOIA case, the defendant agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to FOIA." Carney v. DOJ, 19 F.3d 807, 812 (2d Cir.), cert. denied, 513 U.S. 823 (1994). "Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." Id. (footnote omitted); see also Halpern v. FBI, 181 F.3d 279, 291 (2d Cir. 1999) (same) (citation, alterations, and internal quotation marks omitted). Although this Court reviews de novo the agency's determination that requested information falls within a FOIA exemption, see 5 U.S.C. § 552(a)(4)(B); Halpern, 181 F.3d at 287, the declarations submitted by the agency in support of its determination are "accorded a presumption of good faith," Carney, 19 F.3d at 812 (citation and internal quotation marks omitted).

B. Exemption 6 Protects Individual Privacy Interests

The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." United States Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982). Exemption 6 protects "personnel or medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Supreme Court has interpreted Exemption 6 broadly, making clear that the statutory language files "similar" to personnel or medical files encompasses any "information which applies to a particular individual." Washington Post, 456 U.S. at 602; see also New York Times Co. v. NASA, 920 F.2d 1002, 1005, 1009-10 (D.C. Cir. 1990) (finding voice tapes from the shuttle Challenger to be "similar files" because they identified crew members by the sound and inflection of their voices).

Once it has been established that the information at issue "applies to a particular individual," Washington Post, 456 U.S. at 602, the focus of the inquiry turns to whether disclosure of the record at issue would "constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), which requires a balancing of the public's interest in disclosure against the interest in privacy that would be furthered by non-disclosure. See Department of Defense v. FLRA, 510 U.S. 487, 495 (1994); United States Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 776 (1989); Department of the Air Force v. Rose, 425 U.S.

352, 372 (1976). Establishing that disclosure of personal information would serve a public interest cognizable under FOIA is the plaintiff's burden. See Carter v. United States Dep't of Commerce, 830 F.2d 388, 391 n.13 (D.C. Cir. 1987). The "only relevant public interest to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." Department of Defense v. FLRA, 510 U.S. at 495 (internal citation and quotation marks omitted). Thus, the statutory purpose of FOIA is not "fostered by disclosure of information about private citizens that is accumulated in various government files but reveals little or nothing about an agency's own conduct." Reporters Committee, 489 U.S. at 773.

C. The Identifying Information Is Exempt from Disclosure Under Exemption 6 Because Its Release Would Constitute a Clearly Unwarranted Invasion of Personal Privacy

Because the Identifying Information is contained in "Government records on an individual which can be identified as applying to that individual," the information satisfies the "similar files" requirement of Exemption 6. Washington Post, 456 U.S. at 602. Accordingly, the question of whether its withholding is proper under Exemption 6 turns on whether disclosure would constitute a clearly unwarranted invasion of privacy. Making this determination requires the Court to balance "'the individual's right of privacy' against the basic policy of opening 'agency action to the light of public scrutiny.'" United States Dep't of State v. Ray, 502 U.S. 164, 175 (1991) (quoting Rose, 425 U.S. at 372).

1. The Identifying Information is Personal Information That Implicates Privacy Interests Protected by Exemption 6

The Supreme Court has explained that one of the privacy interests protected by Exemption 6 is "the individual interest in avoiding disclosure of personal matters." Reporters

Committee, 489 U.S. at 762. In recognition of that interest, FOIA's provisions "for deletion of identifying references and disclosure of segregable portions of records with exempt information deleted, reflect a congressional understanding that disclosure of records containing personal details about private citizens can infringe significant privacy interests." Id. at 766. "Once a personal privacy interest is threatened, the plaintiff must assert a public interest in disclosure that outweighs the threat to privacy." Judicial Watch v. Reno, No. Civ.A. 00-0723, 2001 WL 1902811 (D.D.C. Mar. 30, 2001) (no page references in Westlaw document).

Under this balancing test, courts regularly hold exempt from disclosure under Exemption 6 personal information of exactly the kind plaintiff seeks here. See, e.g., Department of Defense v. FLRA, 510 U.S. at 497 (home addresses); Ray, 502 U.S. at 169, 175-76 ("names and other identifying information"); Rose, 425 U.S. 352, 380 (1976) ("personal references and other identifying information"); Sherman v. United States Dep't of the Army, 244 F.3d 357, 365-66 (5th Cir. 2001) (social security numbers); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 747 (9th Cir. 1979) (religious affiliation); Judicial Watch v. Reno, 2001 WL 1902811 (asylum application, which "contains personal information about the applicant and his family, including his personal history and political views") (no page references in Westlaw document); Judicial Watch, Inc. v. United States Dep't of Commerce, 83 F. Supp. 2d 105, 112 (D.D.C. 1999) (names and addresses, dates of birth, social security numbers, visa and passport data); Hemenway v. Hughes, 601 F. Supp. 1002, 1006 (D.D.C. 1985) (citizenship); see also Washington Post, 456 U.S. at 602 (citizenship information should be withheld if release "would constitute a clearly unwarranted invasion of personal privacy").

a) Information That Could Identify an Individual Is Protected by Exemption 6

In particular, disclosure of personal information that could reveal the identity of an individual is routinely held to implicate a privacy interest protected by Exemption 6. Thus, identifying information in addition to names is appropriately redacted from records otherwise subject to release if its disclosure could reveal an individual's identity. For example, in Department of the Air Force v. Rose, 425 U.S. at 380, the Court held that redaction of "'personal references and other identifying information'" from summaries of Air Force Academy disciplinary proceedings against cadets – which plaintiffs in that case agreed was appropriate – properly protected "the confidentiality interests embodied in Exemption 6." (citation omitted).

And in Carter v. Department of Commerce, 830 F.2d at 390, another case analogous to this one, the D. C. Circuit upheld the redaction under Exemption 6 of "'all information leading to the identification of . . . the subject of [] [attorney] disciplinary proceeding[s]'" before the Patent and Trademark Office (quoting agency's characterization of redactions). Id. The redacted information included names and addresses of the subjects of the disciplinary proceedings, "names of their clients and business associates, information regarding patent applications handled by them, and court cases involving them." Id. The plaintiff there had conceded that "information such as names, addresses, and other personal identifying information is properly withheld because it creates a palpable threat to privacy," but challenged the redaction of client and associate names, and patent applications and court cases handled by the subjects of the investigations. Id. at 391 (internal quotations marks and citation omitted). The D.C. Circuit held that because information on court cases is already in the public domain, release of information involving the subject's court cases, "even with the names redacted, could easily lead to the revelation of the documents in their entirety, including the identity of the attorneys involved." Id.; see also Ligorner v. Reno, 2 F. Supp. 2d 400, 405 (S.D.N.Y. 1998) (upholding withholding of entire document under Exemption 6 because redaction of names "would not protect" identities of accuser and accused in document; "the public could deduce the identities of the individuals whose names appear in the document from its context"); Walsh v. Department of the Navy, No. 91 C 7410, 1992 WL 67845 (N.D. Ill. Mar. 23, 1992) (upholding under Exemption 6 redaction of "names and official positions of individuals who provided information to the investigating officer" because "[r]elease of the individuals' official positions would be tantamount to releasing their names") (internal quotation marks omitted) (no page references in Westlaw document) . As the Supreme Court has emphasized, "disclosure of records regarding private citizens, identifiable by name, is not what the framers of FOIA had in mind." Reporters Committee, 489 U.S. at 765.

The rationale for these courts' approval of redaction of identifying information is clear: an individual who is the subject of a government record has a significant privacy interest in identifying information that could link him to details about his personal history. The Supreme Court articulated this doctrine expressly in United States Dep't of State v. Ray, 502 U.S. 164 (1991). In the early 1980s, the United States had a policy of intercepting vessels carrying Haitians attempting to enter the United States illegally and returning the passengers to Haiti unless they qualified for refugee status. See id. at 167. The State Department subsequently obtained the Haitian government's agreement not to prosecute for illegal departure those who had fled and were forcibly repatriated. See id. at 167-68. To monitor Haiti's compliance, the State Department conducted interviews with some of the returnees. See id. at 168.

In response to plaintiff's FOIA request, the State Department produced its reports of the interviews, with the names of the interviewees "and other identifying information" redacted. Id. at 169. Plaintiff challenged those redactions. The Court that the State Department's redactions were proper under Exemption 6. See id. at 178.

The Court's rationale for finding that it would be a significant invasion of privacy for the identity of a particular interviewee to be linked to the details of his personal story is directly applicable here:

> As the Government points out, many of these summaries contain personal details about particular interviewees. Thus, if the summaries are released without names redacted, highly personal information regarding marital and employment status, children, living conditions and attempts to enter the United States, would be linked publicly with particular, named individuals. Although disclosure of such personal information constitutes only a de minimis invasion of privacy when the identities of the interviewees are unknown, the invasion of privacy becomes significant when the personal information is linked to particular interviewees.

Id. at 175-76. In Rose, too, the Court recognized – indeed, plaintiffs there did not even contest – that redaction of names and "other identifying information" from summaries of disciplinary proceedings against Air Force cadets properly fostered "the confidentiality interests embodied in Exemption 6." Rose, 426 U.S. at 380; see also Judicial Watch, 2001 WL 1902811 (document containing biographical information about Elian Gonzalez's father, "including his political affiliations, employment history, and academic records" properly withheld under Exemption 6, where document was known to relate to Gonzalez) (no page references in Westlaw document).

b) Because the Identifying Information Could, Together With Other Available Information, Identify Detainees and Their Witnesses, It Is Protected by Exemption 6

The question of what constitutes identifying information in a particular case "'must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar'" with the subject's personal history. Reporters Committee, 489 U.S. at 768 (quoting Rose, 425 U.S. at 380). In this case, DOD has done exactly that: it has assessed the significance of the large amount of information on detainees that is publicly available, and the likelihood that the detainees' associates abroad are aware of their detention, and concluded that that public and private information could be matched up with the Identifying Information and detailed personal stories revealed in the transcripts to connect the identity of a detainee to the evidence he gave to the CSRT. See supra at 9-11. DOD's assessment should be given credence. See Carter, 830 F.2d at 391 (Court would give credence to agency's assessment that disclosure of client names and business associates of subjects of attorney disciplinary proceedings would reveal identities of subjects because of agency's "familiarity with the patent bar").

The authorities discussed above make apparent that in these circumstances, disclosure of the Identifying Information would implicate significant privacy interests. The redacted information consists of ISNs, names and home locales of the detainees, their countries of origin, names of relatives and associates, and other personal information that together with other public and private information, could reveal a detainee's identity; and identifying information for witnesses before the Tribunals. See supra at 8-9; Hecker Decl. ¶ 3. The Supreme Court has consistently held – in Reporters Committee, Ray, and Rose – that this kind of personal, identifying information implicates the very privacy interests Exemption 6 was meant to protect. See supra at 16-18.

Moreover, the Supreme Court has expressly recognized that "the invasion of privacy becomes significant" when an individual's personal history and information is publicly linked to that particular individual. Ray, 502 U.S. 176. The large amount of information about the detainees available to the public, and the knowledge possessed by the detainees' associates abroad of personal details of their captured colleagues, means that such information could be pieced together – by anyone with the interest – with the Identifying Information and personal stories revealed in the produced transcripts and statements to connect a particular detainee to his testimony before the CSRT. DOD appropriately took into account these public and private sources in concluding that the Identifying Information could be pieced together with other available information to identify particular detainees and connect them to their statements to the CSRTs. See Rose, 425 U.S. at 380 ("what constitutes identifying information" in particular case must be determined based on "viewpoint of the public" and "vantage of those who would have been familiar with" individual's personal history); Carter, 830 F.2d at 391 (taking into account information "already in the public domain" in concluding that disclosure of court cases of attorney who was subject to agency disciplinary proceeding could lead to revelation of attorney's identity in agency disciplinary records). As the case law amply demonstrates, redaction of the Identifying Information safeguards the privacy interests protected by Exemption 6.[9]

c) Potential Harm to Detainees and Their Families From Disclosure of the Identifying Information Increases the Significance of the Privacy Interests at Stake Here

Finally, Ray and other cases also make clear that the possibility that disclosure would subject the individual or his family to harm makes an individual's privacy interest in identifying information all the more significant. See Ray, 502 U.S. at 176-77 ("the privacy interest in protecting [returning interviewees] from any retaliatory action that might result from [the Haitian government's] renewed interest in their aborted attempts to emigrate must be given great

[9] Names of persons mentioned by detainees in their testimony and statements are protected by Exemption 6 for the additional reason that disclosure of that information is identifying as to the mentioned individuals.

weight;" "disclosure of the interviewees' identities could subject them or their families to 'embarrassment in their social and community relationships'") (quoting State Department); Judicial Watch v. Reno, 2001 WL 1902811 (asylum application, which contains "personal history and political views," properly withheld under Exemption 6 because disclosure "may very well endanger [applicant's] life and the safety of other family members") (no page references in Westlaw document); see also Washington Post, 456 U.S. at 597 n.2, 603 (noting that State Department's justification for withholding under Exemption 6 American citizenship information on two Iranian nationals living in Iran included Department's belief that disclosure "would 'cause a real threat of physical harm' to both men"); Hemenway v. Hughes, 601 F. Supp. at 1006 ("risk of harm" to citizens of certain countries, who are "potential targets for terrorist attacks," "might significantly increase if the public retained open access to citizenship information").

Here, DOD has reasonably concluded that identification of a particular detainee with his statements to the CSRT could lead to reprisals against his family at home if terrorist groups are dissatisfied with those statements, and against the detainee himself upon his release or at the hands of other detainees. See Hecker Decl. ¶¶ 9-12.[10] The existence these threats only increases the significance of the privacy interests protected by redaction of the Identifying Information.

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[10] While "[h]ow significant the danger of mistreatment may now be is, of course, impossible to measure," the agency's assessment of the danger is probative. Ray, 502 U.S. 176-77 (crediting State Department's assessment of impact on interviewees and families of disclosure of identifying information in State Department reports of interviews with repatriated Haitians); see also Hemenway, 601 F. Supp. at 1006-07 (crediting State Department's assessment of danger in disclosure of citizenship of news correspondents accredited by Department).

2. The Identifying Information Should Not be Disclosed Because the Privacy Interests Protected by Redaction Outweigh any Public Interest Served by Disclosure

As noted above, the only public interest FOIA protects is "the citizens' right to be informed about 'what their government is up to.'" Reporters' Committee, 489 U.S. at 773 (citation omitted); see also supra at 14. It is undeniable that disclosure of transcripts of CSRT proceedings sheds light on how DOD has carried out its responsibility to develop and conduct proceedings in which Guantanamo detainees could challenge their designation as enemy combatants. The transcripts reveal the questions the detainee was asked and his answers; the Tribunal's treatment of the detainee; the functioning of the personal representative; and the testimony of any witnesses. See Hecker Decl. ¶ 4. The detainee's written statements and documents provided to his personal representative reveal additional aspects of the CSRT process. Thus, the produced documents reveal in detail the functioning of DOD's process for allowing detainees to contest their classification as enemy combatants. To this extent, disclosure of the transcripts and other produced documents serves the public's interest in knowing the workings of the government that FOIA is meant to protect.

However, disclosure of names and other identifying information about the detainees and their witnesses adds nothing to public's understanding of DOD's conduct of the Tribunals; it merely reveals more information about these individuals. In analogous situations, the Supreme Court has determined that the public interest is not served by disclosure.

Thus, in Ray, the Court explained that the redacted reports of the State Department's interviews with repatriated Haitians

> inform the reader about the State Department's performance of its duty to monitor Haitian compliance with the promise not to prosecute the returnees. The

> documents reveal how many returnees were interviewed, when the interviews took place, the contents of individual interviews, and details about the status of the interviewees. The addition of the redacted identifying information would not shed any additional light on the Government's conduct of its obligation.

Ray, 502 U.S. at 178. The Court therefore concluded that the public interest "cognizable under FOIA," – "knowing whether the State Department has adequately monitored Haiti's compliance with its promise not to prosecute returnees" – was "adequately served by disclosure of the redacted interview summaries and that disclosure of the unredacted documents would therefore constitute a clearly unwarranted invasion of the interviewees' privacy." Id. The same is true here: the public interest in making known how DOD conducted the CSRTs is adequately served by the agency's release of the redacted documents, which reveal how the CSRTs were conducted as well as the content of the evidence presented to the Tribunals. Releasing the produced documents in unredacted form would add nothing to the public's knowledge of DOD's performance of those duties.

Likewise in Reporters Committee, the Court held that disclosure of an individual's rap sheet, while it may have "some public interest," does not advance "the type of interest protected by the FOIA" because it reveals information about a particular individual rather the functioning of the government. Reporters Committee, 489 U.S. at 775 (emphasis in original). As the Court explained, in reasoning directly applicable here:

> Conceivably Medico's rap sheet would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA. In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it

> appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.

Id. at 774-75 (emphasis in original); see also id. at 780 (holding individual's rap sheet exempt from disclosure under FOIA Exemption 7(C), because privacy interest in maintaining non-public nature of rap sheets outweighs public interest in their release).[11] In other words, making a news story more interesting is not a public interest that FOIA protects. Also in Reporters Committee, the Court reiterated that in Department of the Air Force v. Rose, 425 U.S. at 381, it was "unquestionably appropriate" (as the plaintiffs there had agreed) that cadet names and other identifying information be redacted from summaries of the Air Force Academy's disciplinary proceedings, "because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a 'clearly unwarranted' invasion of individual privacy." Reporters Committee, 489 U.S. at 773-74.

Ray, Reporters Committee, and Rose make clear that the privacy interests of the detainees and CSRT witnesses outweigh any public interest in disclosure of the Identifying Information. Like the names and identifying information at issue in Ray and Rose, and like the rap sheet at issue in Reporters Committee, little public interest exists in the disclosure of the Guantanamo detainees' names, nationalities, and other identifying information, beyond the curiosity value of knowing the identity of a particular detainee, and being able link him with the particular personal history he provided to the Tribunal. As the cases make clear however, this is not the kind of public interest that FOIA protects, for being able to link the identities of detainees with their stories reveals nothing about DOD's conduct of the CSRTs. Accordingly, disclosure of the Identifying Information would be a "clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), and its withholding is therefore proper under Exemption 6.

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[11] Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7). Like Exemption 6, Exemption 7(C) "call[s] for a balancing of the privacy interests that would be compromised by disclosure against the public interest in release of the requested information." McCutchen v. United States Dep't of Health & Human Servs., 30 F.3d 183, 185 (D.C. Cir. 1994) (citation and internal quotation marks omitted). The difference between the two exemptions, based on the differences in their statutory language, is that "the standard for evaluating a threatened invasion of privacy interests" under Exemption 7(C) "is somewhat broader than the standard applicable to personnel, medical, and similar files" under Exemption 6. Reporters Committee, 489 U.S. at 756. Exemption 7(C) is not asserted here.

CONCLUSION

For the foregoing reasons, the Court should grant DOD's motion for summary judgment, together with such other and further relief as the Court deems just and proper.

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